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Supreme Court of the United States

OCTOBER TERM 1941

No. 928

IN THE MATTER

of

ARMAND SCHMOLL, INC.,

Petitioner and Appellant Below,

v.

THE FEDERAL RESERVE BANK OF NEW YORK,

Respondent and Appellee Below.

PETITION AND SUPPORTING BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR NEW YORK COUNTY

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR NEW YORK COUNTY

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully submits its petition for a writ of Certiorari to review the decision of the Court of Appeals of the State of New York, made on remittitur the judgment of the Supreme Court, affirming the decision of the Appellate Division of the Supreme Court for the First Department, which latter affirmed the resettled order of Mr. Justice Rosenman at Special Term for New York County, in this case, dismissing the Petition herein for an order in the nature of an order of mandamus against the Federal Reserve Bank of New York, and granting its,

the Respondent's, motion to dismiss as a matter of law only viz., upon the ground that the Supreme Court of the State of New York had no jurisdiction of the subject of the proceeding, and specifically excepting any exercise of discretion.

I

Summary statement of the matter involved.

This is a proceeding brought by Petitioner under Article 78, Sections 1288 and 1289, of the New York Civil Practice Act to obtain an order directing the Respondent, The Federal Reserve Bank of New York, a federal statutory agency, resident in, and subject to process in the courts of, New York, to perform a mandatory ministerial duty enjoined upon it by Section 522 (c) of the Tariff Act of 1930, Ch. 497 (46 Stat. 739), U. S. Code, Title 31, Section 372; viz., to determine and certify *nunc pro tunc* to the Secretary of the Treasury the buying rates in the New York market for cable transfers payable in Brazilian milreis on three specified dates, in the manner prescribed by that Section.

This Petitioner seeks a review of the decision of the Court of Appeals of the State of New York, made, on its remittitur, the order and judgment of the New York Supreme Court, affirming the decision of the latter Court, and also declaring it to be its own judgment, that, solely as matter of law, the Supreme Court of the State of New York was without jurisdiction to issue an order in the nature of mandamus running against the Federal Reserve Bank of New York to compel it to determine and certify such buying rates actually prevailing in the New York market for cable transfers of Brazilian milreis, in compliance with the mandatory and ministerial duty imposed upon that Bank by said Section 522 (c).

In January and February 1936, the Petitioner imported three lots of cattle hides from Brazil (R.* 5; Pet. par. 3),

which were subject to an *ad valorem* duty of 10% under Paragraph 1530 (a) of the Tariff Act of 1930. In accordance with Section 488 of that Act, they were appraised in Brazilian milreis as of the dates of exportation from Brazil, December 19, 1935, January 15 and February 8, 1936, at the respective sums of 166,214$400, 532,315$690 and 1,187,615$350 (R. 6; Pet. par. 5). Under that Tariff Act it was the duty of the Collector of Customs of the Port of New York, prior to liquidating the duties on the Petitioner's hides, to convert their appraised values from Brazilian milreis into United States currency, and in so doing to use the rates of exchange determined in the manner prescribed by Section 522 (c) of the Tariff Act of 1930. By that Section, when the value proclaimed quarterly by the Secretary of the Treasury "* * * varies 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. * * * For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. * * *" (Section 522, subdivision (c)).

On the dates in question there was a variance of more than 5% from the proclaimed values and, in liquidating the duties on Petitioner's hides, the Collector converted their appraised milreis value into United States currency at the rates certified by the Respondent-Appellee (R. 8; Pet. par. 10). As shown by the Petition (R. 7-11, 14-15) and the supporting affidavits (R. 17, 18, 19) the Respondent, purporting to comply with Section 522 (c), certified, as the buying rates for cable transfers payable in Brazilian mil-

* Whenever "R", followed by numbers, appears herein it means the page number of the Record herein.

reis, amounts more than 40% in excess of the actual rates, not only on the days in question but throughout the months of December, 1935, January and February, 1936, at the same time admitting that they were not the actual rates and asserting that there were no New York market buying rates for such cable transfers by characterizing each rate it certified as: "Nominal rate. Firm rate not available" (R. 7-8; Pet. par. 9).

The Petition alleges that, as established by the affidavit of an officer of one of the largest New York trust companies (R. 9, 17, 18), an actual market existed in New York during the three months in which there were actual transactions in cable transfers payable in Brazilian milreis and in which firm quotations of the buying rates for such cable transfers were at all times obtainable; that the actual buying rates in the New York market on the three days in question were $0.0555, $0.0560 and $0.0585 per milreis, respectively; that the lowest market buying rate at noon on any day during these three months was $0.0550 and the highest was $0.0585 per milreis (R. 8, 9, 10). Schedules B and C (R. 16, 17) and Exhibit A to affidavit (R. 18-19, fol. 27) giving the actual rates, show stability and lack of fluctuation in them.

Respondent was fully informed of the actual market for such cable transfers, receiving daily reports from its member banks in New York of rates of milreis cable transfers (R. 10, 18, 19); and was required by law to keep "currently informed" as to all foreign exchange transactions and transfers of credits in its district. Every person having a principal place of business in Respondent's district who engaged in such transactions and transfers, with minor exceptions, was required by law to report "complete information relative thereto" to the Respondent. (See Executive Order No. 6560 of January 15, 1934, regulating transactions in foreign exchange, transfers of credit and the export of coin and currency, issued pursuant to Section 5 (b) of the Act of October 16, 1917 (40 Stat. 411), as amended by Section 2

of the Emergency Banking Act of March 9, 1933 (48 Stat. 1), and Regulations of the Secretary of the Treasury issued under said Executive Order on November 12, 1934.)

The actual market rates for the three months never exceeded $0.0585 per milreis, but the lowest rate certified by Respondent during December, 1935, and January and February, 1936, was $0.08250 and the highest was $0.084700 (R. 9, 14, 15). The rates unlawfully certified by Respondent exceeded the actual market rates by an average of more than two and three-quarters (2¾) cents, or some 50% higher than the actual market rates (R. 15, 16).

The Petition shows that the use of the rates actually certified will cause the assessment of duties on Petitioner's hides to exceed the actual duties imposable by law by approximately 40% (R. 12; Pet. par. 15); and that there is no way in which Respondent can be forced to certify correct and lawful rates, other than by an order in the nature of mandamus, which would finally determine the rights of the parties (R. 12; Pet. par. 16).

Petitioner on January 29, 1939 duly demanded of Respondent the lawful action which was refused (R. 12, 14). The present proceedings were thereafter, and within the statutory period of four months after such demand and refusal, commenced to compel Respondent to comply with Section 522 (c) (R. 13, 14, 20; see Section 1286, *infra,* p. 10). Respondent, not answering and so admitting the material allegations of the Petition, moved under section 1293 of the Civil Practice Act of the State of New York to dismiss the petition as matter of law on four objections in point of law (R. 19, 20), the principal and pertinent one and that upon which the decisions below are based being that; "(1) this Court (Supreme of New York) has no jurisdiction of the subject of the proceeding; * * *".

The Respondent's motion for dismissal of the Petition was heard by Mr. Justice Rosenman at the Special Term of the Supreme Court of New York who granted it as above for lack of jurisdiction, and by a resettled order (R. 2-4),

specifically excluded any exercise of discretion (R. 4). The other objections presented by Respondent were not passed upon (R. 29) and the opinion of Justice Rosenman shows the narrow and exclusive ground for his decision (R. 27, 28, 29). Justice Rosenman's decision was upon the theory that Petitioner sought to command the *manner* of performance (actually prescribed by the statute) of a federal duty by a federal agent in the administration of the customs laws, and that a state court possessed no such jurisdiction because this Court had so decided in *M'Clung* v. *Silliman* (6 Wheat. 598) by declaring "* * * that the official conduct of an officer or agent of the United States Government can only be controlled by the power that created him". And he also says that a state court may not "* * * issue an order in the nature of mandamus to an officer or agency of the federal government in relation to the exercise of a federal governmental function by such officer or agency". And he adds that the question is: "It is whether the manner of performance of a specific federal government statutory function by a federal statutory agency can be the subject of a decree of a state court."

The Special Term's exclusive holding of a lack of jurisdiction of the state court to prevent plain, unwarranted violation by Respondent of the federal statute, without consideration of the other objections, was unanimously affirmed without opinion by the Appellate Division of the First Department, which, however granted to Petitioner leave to appeal to the Court of Appeals. The Court of Appeals affirmed the dismissal on the jurisdictional ground, Chief Judge Lehman writing for the majority, all concurring except Conway, J., who dissented in a comprehensive opinion the effectiveness of which makes untenable, as matter of sound reasoning, the majority opinion. (*Armand Schmoll, Inc.* v. *Federal Reserve Bank,* 286 N. Y. 503, 37 N. E. (2nd) 225; R. 37-57.)

To the formal statement of reasons given by Justice Rosenman, Chief Judge Lehman adds the pure assumption

of exclusive power in the federal government, although not in terms given by the Tariff Act, by saying: "No case has been cited which holds that a State Court may go outside that field (that 'of its alleged jurisdiction') and control the manner in which a Federal agency performs or attempts to perform its functions and duties under the Tariff Act or other Federal statute where the Federal government has exclusive jurisdiction. Assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution" (286 N. Y. 503, 509; R. 37).

II

This Court's jurisdiction to review.

The Judicial Code by Section 237 (b) (U. S. C. Title 28, Section 344 (b)) definitely provides for the review by this Court of the final judgment rendered in this matter by the Courts of New York. There are involved questions of the construction of the Tariff Act of 1930, as construed by the courts below, and of the validity under the State Constitution and local law of the Petitioner's substantive right to an order in the nature of mandamus, and of the forms of relief against the Respondent, and of the title, right, privilege and immunities of the Petitioner under the Federal Tariff Act of 1930 and the Constitution of the United States. These jurisdictional matters and rights are confirmed by Article VI, Clause 2, of the Federal Constitution providing that "the Laws of the United States" (including the Tariff Act of 1930) * * * "shall be * * * the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding." The courts below have decided these federal questions of substance in a way probably not in accord with the applicable decisions of this Court.

The Court of Appeals' decision is dated October 16, 1941, and the remittitur bears date October 17, 1941 (R. 52-3), and the order of the Supreme Court for New York County making the order of the Court of Appeals the order of that Court was entered on October 21, 1941 (R. 53-54). The time within which to petition to the Supreme Court of the United States for a writ of certiorari to the Court of Appeals or to the Supreme Court of the State of New York would have expired on January 21, 1942, but an order extending the Petitioner's time within which to apply for said writ of certiorari to February 3, 1942, was granted by Mr. Justice Jackson on January 16, 1942, and entered in the office of the Clerk of this Court (R. 54), and a copy served on the Respondent on January 21, 1942. An order further extending the Petitioner's time within which to apply for said writ of certiorari to February 7, 1942, was granted by Mr. Justice Jackson on January 29, 1942 and entered in the office of the Clerk of this Court (R. 55).

III

Statutes involved.

This case involves the interpretation and enforcement of Section 522 of the Tariff Act of 1930, Ch. 497 (46 Stat. 739) U. S. Code, Title 31, Section 372; R. 6, 7). The relevant provisions of this Act are contained in Section 522 (c). Under that Act, for the purpose of the assessment and collection of duties upon merchandise imported into the United States, wherever it is necessary to convert foreign currency of the United States under the conditions provided by Section 522 (c), conversion of such foreign currency shall be made at a value measured by the buying rate in the New York market, at noon on the date of exportation, for cable transfers payable in the foreign currency so to be converted. Section 522 (c) meticulously prescribes the method in which such determination shall be made. By that Section

the Federal Reserve Bank of New York is authorized and required to determine in the manner therein prescribed, and to certify daily to the Secretary of the Treasury, the buying rate for such cable transfers.

Section 522 (c) reads as follows:

> "(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate on the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for the cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal Reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange."

Title 12, U. S. C., Section 341, is also involved, which provides that the Federal Reserve Bank of New York "shall have power— * * * to sue and be sued, complain and defend, in any court of law or equity". That this includes state courts is confirmed by Section 632, of 12 U. S. C., which permits but does not require the removal to the federal courts of suits to which a Federal Reserve Bank is a party and provides that no attachment or execution shall issue against the respondent before final judgment in any suit, in any state, county, municipal or United States court (Appendix, p. 30).

Sections 1283, 1284, 1285, 1286, 1288, 1289, 1293, 1295, 1296, 1300 and 1306 of *Article* 78 (L. 1937, Ch. 526) of the New York Civil Practice Act are also involved, as confirming and granting original jurisdiction to the Supreme Court of the State of New York to entertain proceedings in the nature of mandamus as part of the ordinary civil remedies in the courts of the state. The relevant portions of these sections are set out in the Appendix to the Petition at pages 27-29, *infra.*

Section 1283 of Article 78 provides that "the classifications, and writs and orders of certiorari to review, mandamus and prohibition are hereby abolished. The relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article."

Section 1284, *inter alia,* provides (1) "The expression 'body or officer' includes every court, tribunal board, corporation, officer or other person, or aggregation of persons, whose action may be affected by the proceeding under this article"; * * * (3). "The expression 'to compel performance of a duty specifically enjoined by law' refers to all other relief heretofore available in a mandmus proceeding"; and (4) that "nothing in this article shall be deemed to continue or establish distinct remedies."

Section 1286 provides, as to "Limitations of Time," that "a proceeding under this article * * * to compel performance of a duty specifically enjoined by law, must be instituted by service of the petition and accompanying papers, as prescribed in Section twelve hundred and eighty-nine of this article within four months * * * after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform his duty * * *."

Section 1295 provides: "Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the court shall forthwith render such final order as the case requires * * *."

Section 1300 provides that "the court shall render a final order granting the petitioner the relief to which it deems he is entitled, or dismissing the proceeding, either on the merits or with leave to renew."

IV

The questions presented.

The questions fundamentally involved are as follows:

(1) Did the Courts below err in holding that Petitioner sought to direct the *manner* of performance by a federal agency of its statutory duties when the statute (Section 522 (c) of the Tariff Act of 1930) itself prescribed the manner of performance and that consisted of merely reporting the rates for cable transfers in the New York market, which market registered automatically those rates, with the prescribed duty and manner of performance being and becoming purely mandatory and non-discretionary?

(2) Did the Courts below err in holding that the Supreme Court of New York was without jurisdiction to restrain Respondent from violating Section 522 (c) of the federal Tariff Act or to compel it to comply with that Act when the Tariff Act did not exclude State power to act; and further err, with this held on the ground that this Court had so decided in *McClung* v. *Silliman,* 6 Wheaton 598?

(3) Did the Courts below err in holding that the incorrect and false reporting of the buying rates in the New York market for cable transfers by the Respondent, as a federal agent, in violation of Section 522 (c) of the federal Tariff Act of 1930, was a political and sovereign act of the federal government which the Supreme Court of New York was without jurisdiction to prevent or correct by mandamus or other remedy?

(4) Is the Supreme Court of New York State, acting under Article 78 of the New York Civil Practice Act, without jurisdiction, solely because it is a State court, to compel

the Respondent as a federal agent to perform the mandatory, ministerial duties imposed upon it by Section 522 (c) of the Tariff Act of 1930?

(5) Did the Courts below err in failing to hold that the Congress, by expressly investing Respondent with the power to "sue and be sued in any court of law or equity," withdrew, and intended to withdraw, from Respondent any immunity as a federal agent, from the jurisdiction of State Courts and intended to apply to it any of their usual civil remedies and process to compel Respondent to comply with Section 522 (c) of the Tariff Act of 1930?

(6) Did Congress by the Tariff Act of 1930 expressly or by necessary implication confer on the federal Collector or the Customs Courts having power to review his decisions or on any other federal agency, exclusive jurisdiction to enforce or to fail to enforce performance by the Respondent, The Federal Reserve Bank of New York, of the mandatory, ministerial duties imposed on it by Section 522 (c), or invest the Collector or any other federal agency with any jurisdiction or power whatever over Respondent to compel such performance?

(7) In the absence of any such statutory, exclusive jurisdiction conferred upon the federal Collector or the Customs Courts or any other federal agency, or of any adequate statutory remedy given to persons whose vested rights under Section 522 (c) have been violated by Respondent, has the Supreme Court of the State of New York, in proceedings brought under Sections 1288 and 1289 of Article 78 of the New York Civil Practice Act and under the decisions of the New York Court of Appeals in mandamus or similar proceedings, jurisdiction to compel Respondent to perform its mandatory, ministerial duties imposed upon it by Section 522 (c), or to restrain and otherwise correct palpable violations thereof?

(8) Did the Courts below err in holding, in effect, that the use in the instant case of the local New York substantive statutory proceedings and its ordinary remedies in a civil suit in the nature of mandamus under Article 78 of the New York Civil Practice Act, to compel by order the Respondent,—a federal governmental statutory agent resident in New York, subject "to sue and be sued" in the Supreme Court of the State of New York, and designated by Congress as such governmental agency for the sole and express purpose of effectuating the mandatory provisions of Section 522 (c) of the Tariff Act of 1930,—to comply with the terms of such section and to perform its mandatory, ministerial duties as prescribed therein, constitutes such a grave limitation by the New York Legislature and Supreme Court upon such federal agent's powers and ability to perform its mandatory, statutory duties and functions as not to have been intended by the Congress to have been included in its general statutory withdrawal of such governmental federal agent's immunity from suit under the "sue and be sued" provisions of Title 12, U. S. C. Section 341,—and so imposes an implied limitation upon the general withdrawal by Congress from the Respondent of any immunity from such suit and process?

V

The reasons relied upon for the allowance of certiorari.

The grounds which call for the granting of the Writ of Certiorari and of the relief sought by Petitioner are most adequately and competently set forth by Judge Conway in his careful and full dissenting opinion (286 N. Y. 503, at 509-525; R. 37-51). Those grounds there stated are hereby adopted and incorporated in this Petition as if fully set forth herein and are sufficient in themselves. However, in addition, Petitioner briefly states the reasons, and in con-

travention of those advanced by Chief Judge Lehman (286 N. Y. 506-509), in the following fashion:

Petitioner never sought to command the *manner* of performance of the duty of the federal agent, as declared by the majority below (286 N. Y. 508-509; R. 34, 37). That "manner" or rather method of performance is carefully prescribed by section 522 (c) of the Tariff Act itself, and Petitioner sought only to prevent the palpably unlawful act of Respondent in violating its mandatory, ministerial, statutory duty, and thus to compel compliance with the federal act. There is lack of jurisdiction in the State Court only in the event that its judicial order would gravely interfere with the performance of a governmental function or would impair the authority or efficiency of the federal agent. (*F. H. A.* v. *Burr,* 309 U. S. 242, 245, 249; *First National Bank* v. *Missouri,* 263 U. S. 640, 659; *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 237; Compare *National Bank* v. *Commonwealth,* 9 Wall, 353, 361-2). Here neither objection is good for Petitioner seeks only to have Respondent perform its statutory duty and keep within the law rather than to permit it to clearly and intentionally violate it.

There is no language, either express or necessarily implied, in Section 522 (c) or in any other provision of the Tariff Act of 1930 by "* * * which the state government is excluded" (286 N. Y. at 506; R. 35); and *McClung* v. *Silliman* (6 Wheat. 598) does not hold "* * * that the state court is without power to give such directions to a federal officer acting under a federal statute * * *". The statutory duty to report the actual buying rates prevailing in the New York cable transfer market, even if misnamed a "governmental function", does not involve in any wise a political or sovereign act of the federal government. The rates are actually made by the New York market, by the transactions had daily between buyers and sellers of the exchange. No act of the sovereign makes them. Congress has required that what actually happens in the market be in effect automatically reported. There is no act of the sovereign in this and on the part of the federal

agent there is only a ministerial duty. *Kendall* v. *United States,* 12 Peters 524, at pp. 609-610; *Philadelphia* v. *Stimson,* 223 U. S. 605, 619, 620; *Lessin* v. *Board of Education,* 247 N. Y. 503, 510, 511; *People ex rel. Equitable Life Ass. Soc.* v. *Pierce,* 187 App. Div. 437, aff'd 229 N. Y. 514. When the sovereign acts by lowering, through a law of Congress, the rate of duty or the President under the flexible tariff law lowers a specific duty, a citizen in a particular industry may be severely injured or his business wholly destroyed. This, however, is without redress to him, for the sovereign or people is acting in its political capacity. This did not happen to the Petitioner, for its injury is due to an unlawful act, a failure by the federal agent to comply with the mandatory prescription of the federal law.

There is here no basis for exclusion of the State Court from administering the only effective remedy by mandamus to enforce the federal act. There is concurrent jurisdiction in the State to enforce federal laws by any appropriate form of action or civil remedy provided by the state laws, unless and until Congress by clear direction vests exclusive jurisdiction in federal authorities. *Claflin* v. *Houseman,* 93 U. S. 130, 136-7; *Second Employers Liability Cases,* 223 U. S. 1, 55-59; *Minn. & St. Louis R. R.* v. *Bombolis,* 241 U. S. 211, 221-2; *St. Louis B. & M. Ry. Co.* v. *Taylor,* 266 U. S. 200, 207-8; *Galveston etc. Ry. Co.* v. *Wallace,* 223 U. S. 481, 490; *Panama R. R. Co.* v. *Vasquez,* 271 U. S. 557; aff'g 239 N. Y. 590; *Hines* v. *Lowrey,* 305 U. S. 85; *People* v. *Welch,* 141 N. Y. 266, 272-3, 275.

In the *Taylor* case, 266 U. S. 200, Mr. Justice Brandeis said at page 208:

> "The origin of the right does not affect the manner of administering the remedy. The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the Court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. Louis, R. R. Co.* v. *Bombolis,* 241 U. S. 211, 221. * * *"

State courts, with the support of this Court, have been continually furnishing relief to suitors against federal agents for their violations of, or departures from, federal statutes. So far as state courts are concerned, the Courts below erroneously held that the only relief they cannot grant is to prevent plain violation of or to enforce compliance with a federal statute imposing a mandatory and ministerial duty. However, the federal courts of the District of Columbia may and do grant such specific relief merely because Congress has vested in them the same judicial power as exists in the State of Maryland under its Constitution and laws. *Kendall* v. *United States,* 12 Peters 524. That, of course, includes mandamus and New York must enjoy the same rights and power, unless clearly excluded by act of Congress (Conway, J., 286 N. Y. at 523, 524; R. 50, 51).

The case of *McClung* v. *Silliman,* upon the alleged authority of which the decisions below rest, does not hold that state courts are without authority to issue mandamus to federal agents. There the state court, on the Government's preliminary objection that there was no such jurisdiction, held to the contrary. On the later trial, on a stipulation of facts, it decided against the applicant on the merits. This Court affirmed the Ohio court's judgment on the merits, thereby upholding the latter's jurisdiction.

What the *McClung* case actually decided is challenged, of course. What the Court does by its mandate and judgment, rather than its opinion, must determine the true holding of the case. At the foot of the opinion the Supreme Court declares:

> "Judgment. This cause came on to be heard, on the transcript of the record of the Supreme Court of the State of Ohio, for Muskingum County, and was argued by counsel. On consideration whereof, it is *Adjudged and Ordered,* that the judgment of the said Supreme Court of the State of Ohio, be, and the same is hereby affirmed, with costs; it being the opinion

> of this Court, that the said Supreme Court of the State of Ohio, had no authority to issue mandamus in this case."

If it had intended to hold flatly that no state court has any power to issue an order or judgment against a federal agency, because only the creator may control the created, this Court would in terms have said so. Instead of dismissing for lack of jurisdiction, the mandate affirmed the Ohio court's judgment and the added language of lack of authority in the Ohio court "to issue a mandamus in this case", simply refers to the lack of merits warranting no mandamus "in this case". The full meaning of the phrasing of the Court's mandate, by which the holding in the *McClung* case must be determined, which directed an *affirmance* of the judgment of the Ohio Supreme Court dismissing on the merits McClung's motion for a mandamus, but adding "it being the *opinion* of this Court that the said Supreme Court of the State of Ohio, had no *authority* to issue a mandamus in this *case*" (italics supplied), is highly important. (See review of this case in dissenting opinion of Conway, J. (286 N. Y. at pp. 514-518; R. 42-45)). The meaning of such phrasing was early explained by Chief Justice Marshall in *Marbury* v. *Madison* (1 Cranch 137, at p. 172) where he said of another mandamus case:

> "When the subject was brought before the Court, the decision was, not that a mandamus would not lie to the head of a department directing him to perform an act, enjoined by law in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made if the report of the Commissioners did not confer on the applicant a legal right."

The McClung mandate necessarily means that the refusal of mandamus was for lack of merit and not for lack of jurisdiction. The affirmance of the Ohio court's judgment —a dismissal on the merits—is conclusive as to that Court's jurisdiction and means that, if on the merits the mandamus

had been awarded, it would have been affirmed and sustained by this Court. This has been confirmed in a later state court case, where, instead of dismissing for lack of jurisdiction, this Court reversed but remanded proceedings to the state court, thereby implying and affirming jurisdiction (*Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152.)

Moreover, if, as asserted by the Court of Appeals, there were any rule of exclusion laid down in the *McClung* case (286 N. Y. 506-509; R. 34-37), based on the claim of warring sovereignties rejected in *Claflin* v. *Houseman,* 93 U. S. 136-7, that the federal jurisdiction excludes state interference, such rule must be reciprocal and then state jurisdiction would preclude interference by federal authorities or courts with state duties and officers.

The Government, in its Brief in the Court of Appeals, at page 14, concedes this rule of reciprocity by saying: "Since the federal government and the state government represent separate jurisdictions, it is only natural that the governmental functions of the one are not subject to the control of the courts of the other, except for the limited control which federal courts may exercise to enforce the Constitution and statutes of the United States as the supreme law of the land." This Court has, however, on the contrary decided that federal courts might issue mandamus compelling state or county officers to levy and collect taxes under state laws the doing of which the state courts had theretofore enjoined. (*Riggs* v. *Johnson County* (1867), 6 Wall. 166; *Supervisors* v. *United States,* 4 Wall. 435; *Mobile* v. *Watson,* 116 U. S. 289; *Macon County* v. *Huidekoper,* 134 U. S. 332; *Arkansas* v. *St. Louis S. F. Ry. Co.,* 269 U. S. 172.) Of course, the relief sought by McClung, if granted, would have interfered with a matter committed by the statute exclusively to a federal officer invested with *quasi-judicial* powers (*Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324) or required him to violate the law (*United States* v. *Stone,* 2 Wall. 525, 535; *Hoofnagle* v. *Anderson,*

7 Wheat. 214, 215; *Simmons* v. *Wagner,* 101 U. S. 260; *Smelting Co.* v. *Kemp,* 104 U. S. 636, 647; *Moore* v. *Robbins,* 96 U. S. 530); and so on the merits the decision was proper and supportable (286 N. Y. at 517; R. 44). As pointed out by Judge Conway (286 N. Y. at 517; R. 44): "The Register had no power or duty to do the act which McClung sought to force him to perform. (*Simmons* v. *Wagner,* 101 U. S. 260, 261, 262; *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10, 17, 18.) For that reason no court, State or federal, had power to grant the relief sought in the *McClung* case."

This Court in the *McClung* case, on *his* writ of error, had no jurisdiction of the federal question of the claimed immunity of the Register, Silliman, as a federal officer, from the jurisdiction of the Ohio court, and the part of Justice Johnson's opinion relating thereto was, therefore, dictum and of no binding authority. No federal question is raised under the 25th section of the Judiciary Act and this Court is without appellate jurisdiction, unless the federal act alleged to create rights in plaintiff in error is shown by the record *to be applicable and to have been applied.* (*Miller* v. *Nichols* (1820), 4 Wheat. 311, 315; *William* v. *Norris,* 12 Wheat. 117, 124; *Hickie* v. *Starke,* 1 Pet. 98, 99; *Crowell* v. *Randell,* 10 Pet. 368, 391, 394-5; *Fisher's Lessee* v. *Cockerell,* 5 Pet. 248, 258.) Only the federal question of the construction of the Act of May 10, 1800 (2 Stat. 73), as to the validity of the prior sales of fractions separated by the navigable river Muskingum was raised by *McClung's* writ of error. (See Record in this Court, in *McClung* v. *Silliman,* 6 Wheat. 598 and, *infra,* pp. 57-60). McClung's writ gave this Court only appellate jurisdiction to construe the act as to the validity of those sales, but did not give it jurisdiction to pass upon Silliman's claimed immunity, as a federal officer, from the Ohio court's jurisdiction. No such federal question was before this Court on McClung's writ of error.

The Supreme Court of New York, under its Constitution and laws, always had general jurisdiction at law and in

equity, including power to issue mandamus or an order in the nature of mandamus, which is confirmed by the New York local law known as (new) Article 78 of the Civil Practice Act, and the mandamus decisions of the New York Court of Appeals, made applicable by the decision of this Court. (*Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64.)

Article 78 contains no limitation upon a proceeding thereunder against a resident officer, agency or instrumentality of the United States to compel performance of a duty imposed upon it by law, under an Act of Congress. As Clause 2 of Article Sixth of the Constitution of the United States provides that acts of Congress "shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding" (See *Hines* v. *Lowrey,* 305 U. S. 85, at p. 91), it follows that the performance of a duty specifically enjoined by Act of Congress upon a resident federal agency subject to suit in the Supreme Court of the State of New York, may be compelled under Article 78 of the New York Civil Practice Act. The Respondent is admitted to be such an agency. Congress has specifically provided (Title 12, U. S. C. A. § 341) that a Federal Reserve Bank shall have power— "* * * Fourth. To sue and be sued, complain and defend in any court of law or equity,".

In New York State, by the decisions of the Court of Appeals, governmental agencies performing a governmental duty not judicial in its nature are not immune from liability for their torts or from liability in mandamus. *Baird* v. *Supervisors Kings County,* 138 N. Y. 95, 115, 116 (mandamus); *Matter of Lewis* v. *Carter, et al., Individually and as the Board of Parole for State Prisons,* 220 N. Y. 8, 18 (mandamus); *People ex rel. Equitable Assurance Soc.* v. *Pierce,* 187 App. Div. 437, aff'd 229 N. Y. 514 (mandamus); *Matter of Potts* v. *Kaplan,* 264 N. Y. 110, 117 (mandamus); *People ex rel. Hilliker* v. *Pierce,* 64 Misc. 627 (mandamus); *Lessin* v. *Board of Education,* 247 N. Y. 503,

510, 511 (tort); *Herman* v. *Board of Education,* 234 N. Y. 196 (tort); *Jaked* v. *Board of Education,* 198 App. Div. 113, 118, aff'd 234 N. Y. 591 (tort). In the *Lessin* case, *supra,* Lehman, J., writing for an unanimous court, said:

> "The State has created the Board of Education as a corporate agent to discharge governmental functions. No exemption from responsibility for dereliction in the discharge of a corporate duty has been granted * * *. The Board has * * * failed to perform a duty imposed upon it by law, and liability may be predicated upon its own wrong."

Under the rule of *Erie R. R.* v. *Tompkins,* 304 U. S. 64, 78, the above decisions of the New York Court of Appeals are the equivalent of New York statutes, as setting out the local law that agencies performing a governmental duty not judicial in its nature are not immune from liability for their torts or immune from mandamus orders compelling them to perform mandatory, ministerial duties, and so are subject to proceedings under Article 78 of the Civil Practice Act.

In *People ex rel. Solomon* v. *Brotherhood of Painters,* 218 N. Y. 115, the Court of Appeals, by Seabury, J., said:

> "Mandamus was originally regarded as a prerogative writ. In modern times it has been somewhat assimilated to ordinary remedies. The power of the courts to grant a remedy by means of this writ is derived from the common law and from statutory enactments. The common law right to issue the writ is limited to the enforcement of some duty prescribed by law *as against persons and corporations within the jurisdiction.*" (Italics ours.)

The Tariff Act of 1930 vests no power in any of the federal agencies, and especially not in the customs authorities and courts, to correct the violations (286 N. Y. at 513; R. 41) and the departures from the law committed by Respondent in exceeding its jurisdiction and openly failing

to perform the mandatory and ministerial duties prescribed by Section 522 (c) of the Tariff Act of 1930. Respondent claimed below that, notwithstanding their lack of such power, the Collector and the Customs Courts were given exclusive jurisdiction in customs matters. In answer Judge Conway, in his dissenting opinion in the Court of Appeals in this case, at page 513 of 286 N. Y. (R. 41), said:

> "To sustain this contention of respondent, would be to say that a Congressional statute by implication excluded State courts from exercising jurisdiction beyond the powers of the Collectors and the Customs Courts, although such jurisdiction had been conferred upon them by our laws. It is a sufficient answer to quote the following from *Dudley* v. *Mayhew* (3 N. Y. 9, 15):
>
> 'It is very clear that when a party is confined to a statutory remedy, he must take it as it is conferred; and that where the enforcing tribunal is specified, the designation forms a part of the remedy, and all others are excluded. *The rule is inapplicable, of course, where property or a right is conferred, and no remedy for its invasion is specified. Then the party may sustain his right or protect his property in the usual manner.* That is in such cases reasonably supposed to be the intention of the Legislature, *as it could not be the design to confer a barren property or a fruitless right, which could not be protected or enforced anywhere.*' (Italics supplied.)"

The Government, in its Brief in the Court of Appeals, urged that the action of Respondent "* * * is not subject to control by any court" (Point I, p. 17) and that it "* * * is not subject to control by a state court because such action is in performance of a government function of the United States" (Point II, p. 23), and that Congress has indicated an intent to restrict all reviews of customs questions to the United States Custom Court, "By the elaborate and comprehensive system for the administration of the customs laws which has been established, * * *" (Point III, pp. 32-33), conceding, however, that: "This limitation is

found, not in the words of any statute, but in the fact that Congress has established a comprehensive system * * *" (Brief, p. 15).

These points are sufficiently answered by Judge Conway in his dissent (See 286 N. Y. at 516-8, R. 45, 46; ib. at 512-3, R. 40, 41). Of course control by the federal courts has frequently been exercised. (*Waite* v. *Macy,* 246 U. S. 606, 608-10; *United States* v. *United States Tariff Commission,* 6 F. (2d) 491, reversed on ground case had become moot, in 274 U. S. 106; *Calf Leather Tanners' Ass'n* v. *Morgenthau,* 80 F. (2d) 536, 541-2, cert. den. 297 U. S. 718; *De Lima* v. *Bidwell* (assumpsit against Collector of Customs for exceeding his jurisdiction in exacting duties), 182 U. S. 1, 175-7, 179; *In re Fassett,* 142 U. S. 479, 486, 487 (libel); *Conklin* v. *Newton,* 2 Cir. 34 F. (2d) 612, 514 (conversion by Collector); *Giles* v. *Newton* (D. C. E. D. N. Y.), 21 F. (2d) 848 (conversion by Collector); Compare: *Hoyt* v. *Gelston* (1816), 13 Johns. R. 141, 151, aff'd 3 Wheat. 246, 334 (trespass against Collector of Customs for seizure of a ship); *Ripley* v. *Gelston* (1812), 9 Johns. R. 201 (assumpsit against Collector); *Schall* v. *Newton,* 217 App. Div. 171, aff'd 245 N. Y. 576 (conversion against Collector of Customs for breach of duty. Compare: *Blair* v. *United States,* 6 F. (2d) 481).) These cases necessarily uphold the jurisdiction (not exclusive of state court jurisdiction) of federal courts other than the Customs Courts to enforce by mandamus or injunction mandatory statutes involving the Tariff.

The fundamental rule of a court's existence that, where there is a right, it will find a remedy, has been ignored in an instance of a right explicitly accorded to importers, such as the Petitioner, by a federal statute flagrantly violated by a federal agent, the Respondent, to the great discrimination and grave injury of petitioner. (*Blair* v. *United States,* 6 Fed. (2d) 484, 486; *Richbourg Motor Co.* v. *U. S.,* 281 U. S. 528; *DeLima* v. *Bidwell,* 182 U. S. 1, 176-177, 179.)

The *DeLima* case, *supra,* was an action for money had and received brought by an importer against the Collector of the Port of New York, in the Supreme Court of the State of New York and subsequently removed to the Circuit Court, for duties illegally exacted on a cargo of sugar from Porto Rico that was held by this Court not to be "imported merchandise". There this Court said, at pages 176-177:

> "Conceding * * * that no remedy exists under the Customs Administrative Act, does it follow that no action will lie? If there be an admitted wrong, the courts will look far to supply an adequate remedy. * * * If the position of the Government be correct, the plaintiff would be remediless; and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestic port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position."

(See also review of the instant case in 55 Harvard Law Review at p. 674 (Feby. 1942) expressing the opinion that the decision of the New York Court of Appeals was erroneous.)

Not only was no power given to the Collectors or the Customs Courts by the Tariff Act of 1930, to compel the respondent to comply with the mandatory provisions of Section 522(c), and no adequate remedy was given by the Act to persons whose vested rights were violated by the refusal of the respondent so to comply, and consequently no basis whatever exists for the *implication* that Congress intended to confer exclusive jurisdiction upon the Collectors and the Customs Courts or any Courts having power to review their decisions, to enforce Section 522(c); but Congress, by investing Federal Reserve Banks with the power "to sue and be sued in any court of law or equity" expressly withdrew and intended to withdraw from the respondent any immunity from suit in State Courts and conferred upon persons so suing the right to make use of any appropriate state civil remedy to enforce the mandatory provisions of

Section 522(c). (*F. H. A.* v. *Burr*, 309 U. S. 242, 245, 249; *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 237; Compare: *Claflin* v. *Houseman*, 93 U. S. 130; *St. Louis B. & M. R'y* v. *Taylor*, 266 U. S. 200, 207-8; *Minn. & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, 218, 221.)

The annexed Brief, hereby made a part of this petition, as if fully set forth herein, presents thoroughly, in detail and with sufficient supporting cases, the grounds upon which petitioner relies in praying this Court for the allowance of a Writ of Certiorari in the above case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York for New York County, commanding such Court to certify and send to this Court for its review and determination, at a date to be therein named, a full and complete transcript of the record and all proceedings, in the case entitled on its docket Index No. 6886—1939, *In the Matter of Armand Schmoll, Inc., Petitioner* v. *The Federal Reserve Bank of New York, Respondent;* that said order of the said Supreme Court of the State of New York for New York County may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

HERSEY EGGINTON of
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Attorneys for Armand Schmoll, Inc.,
Petitioner-Appellant.

Signed in behalf of the petitioner and its counsel on this 6th day of February, 1942.

By HERSEY EGGINTON.